86-938

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

STATE OF TENNESSEE,

Petitioner,

vs.

LAMAR FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee At Jackson

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a sentencing proceeding to determine habitual criminality status, the trial court's jury instructions on the element of identity violated *Sandstrom v. Montana,* 442 U.S. 510 (1979), by being capable of an interpretation that the burden of proof was shifted to the defendant on that element.

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STATE OF TENNESSEE,

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vs.

LAMAR FLETCHER,

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On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee At Jackson

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee at Jackson, not yet reported, was filed on August 13, 1986, and appears as Appendix A.

The order of the Supreme Court of Tennessee denying the petitioner discretionary review under Tenn. R. App. Proc. 11, was filed on September 29, 1986, and appears as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on August 13, 1986. Discretionary review was sought in the Supreme Court of Tennessee, and was denied on September 29, 1986. This petition was filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

The respondent, Lamar Fletcher, was indicted and subsequently found guilty of two counts of armed robbery[1]

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[1]Tenn. Code Ann. § 39-2-501:

(a) Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years.

Provided further, that if the robbery be accomplished by the use of a deadly weapon and the robbery be of a business establishment which sells controlled substances classified in Schedules I-VI pursuant to chapter 14 of title 52, the punish-

(Continued on following page)

and of being an habitual criminal[2] as to each offense. The trial court sentenced the respondent to serve two concurrent life sentences.[3]

(Continued from previous page)

ment shall be imprisonment for life or for any time not less than ten (10) years and no person convicted of such offense shall be eligible for release classification, or parole, until such time as he has served ten (10) full calendar years of such sentence. Such offense is a Class X felony.

(b) A robbery accomplished by the use of a deadly weapon is a Class X felony.

[2]Tenn. Code Ann. § 39-1-801:

Any person who has either been three (3) times convicted within this state of felonies, not less than two (2) of which are among those specified in §§ 39-2-103, 39-605 [repealed], 39-2-111, 39-2-112, 39-2-640, 39-6-417(a)(1)(A), 40-20-112 or were for a crime punishable by death under existing law, but for which the death penalty was not inflicted, or who has been three (3) times convicted under the laws of any other state, government or country of crimes, not less than two (2) of which, if they had been committed in this state, would have been among those specified in said §§ 39-2-103, 39-605 [repealed], 39-2-111, 39-2-112, 39-2-640, 39-6-417(a)(1)(A), 40-20-112 or would have been punishable by death under existing laws, but for which the death penalty was not inflicted, shall be considered, for the purposes of this part, and is declared to be an habitual criminal, provided that petit larceny shall not be counted as one of such three (3) convictions, but is expressly excluded; and provided, further, that each of such three (3) convictions shall be for separate offenses, committed at different times, and on separate occasions.

[3]Tenn. Code Ann. § 39-1-806:

When an habitual criminal, as defined in § 39-1-801, shall commit any of the felonies therein specified or referred to, he shall, upon conviction, under presentment or indictment in form as herein provided (except where the death penalty is imposed), be sentenced as an habitual criminal, and his punishment shall be fixed at life in the penitentiary, and such offender shall not be eligible to parole, nor shall said sentence be reduced for good behavior, for other cause, or by any means, nor shall the same be suspended.

In the habitual criminal phase of the respondent's trial, the petitioner introduced records that showed a person by the same name of the respondent had previously been convicted of assault to commit murder in the first degree, murder in the second degree, receiving stolen property valued over one hundred dollars ($100.00), and five (5) separate offenses of grand larceny, said prior crimes qualifying the respondent to be characterized as an habitual criminal under Tenn. Code Ann. § 39-1-801.

The trial judge charged the jury by reading Tenn. Code Ann. § 39-1-804.[4]

On appeal, the respondent argued, *inter alia*, that Tenn. Code Ann. § 39-1-804 is unconstitutional and, alternatively, that the trial court unconstitutionally failed to give proper instructions to the jury on the nature of the "prima facie" provision of the statute.

The Tennessee Court of Criminal Appeals found that the statute is constitutional, but also held that under the principles of *State v. Merriweather*, 625 S.W.2d 256 (Tenn. 1981), and *State v. Bryant*, 585 S.W.2d 586 (Tenn. 1979), the failure of the trial court to give proper instructions as to

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[4]Tenn. Code Ann. § 39-1-804:

In all cases where a person is charged under the provisions of this chapter with being an habitual criminal, the record, or records, of prior convictions of such person upon charges constituting felonies, shall be admissible in evidence, but only as proof that such person is, in fact, an habitual criminal, as defined in § 39-1-801, and a judgment of conviction of any person in this state, or any other state, country or territory, under the same name as that by which such person is charged with the commission, or attempt at commission, of a felony under the terms of this chapter, shall be prima facie evidence that the identity of such person is the same.

the meaning and nature of the "permissive inference" established by the statute was error and remanded the case for a new hearing on the habitual criminal phase, in which the trial court would give proper instructions.

One member on the Tennessee Court of Criminal Appeals, Judge John K. Byers, dissented and, relying on *McMillan v. Pennsylvania,* — U.S. —, 106 S.Ct. 2411, (1986), concluded the State is free to allocate some burden of persuasion to the defendant in a sentencing procedure; therefore, the instruction was not unconstitutional.

The Supreme Court of Tennessee denied the petitioner's application for permission to appeal.

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REASONS FOR GRANTING THE WRIT

The Tennessee Court Of Criminal Appeals Erroneously Found That The Trial Court's Jury Instructions On Identity Violated Due Process.

The state appellate court has misapplied the holding of this Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Therefore, this Court should grant the writ of certiorari and review the issue presented in this case.

In holding that Tenn. Code Ann. § 39-1-804 creates a permissive inference and not a mandatory presumption and that the failure of the trial court to give proper instructions as to the meaning and nature of the inference was error, the Tennessee Court of Criminal Appeals relied upon the principles enunciated in *State v. Merriweather,* 625 S.W.2d 256 (Tenn. 1981), and *State v. Bryant,* 585 S.W.2d 586 (Tenn. 1979).

In *Merriweather,* the Tennessee Supreme Court construed Tenn. Code Ann. § 39-1960 (currently § 39-3-302)[5] as creating a permissive inference. *State v. Merriweather, supra,* at 257-258. The court, relying on *State v. Bryant, supra,* held the jury instruction in a prosecution under the bad check law should include an explanation indicating to the jury the permissive nature of the inference created by the statute. *Id.,* at 258.

In *Bryant,* The Tennessee Supreme Court held that Tenn. Code Ann. § 39-2802 (currently § 39-2-704)[6] creates a permissive inference, one which allows, but does not require, the jury to infer the inferred fact from the proved fact. *Id.,* at 589. The Court expressly interpreted the statute liberally so as to sustain its constitutionality and to

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[5]Tenn. Code Ann. § 39-3-302:

As against the maker, or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence and create a presumption of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, corporation, firm or person, provided such maker or drawer shall not have paid the holder thereof the amount due thereon within five (5) days after receiving notice that such check, draft or order has not been paid by the drawee.

[6]Tenn. Code Ann. § 39-2-704:

If any person or persons disguised or in mask, by day or by night, shall enter upon the premises of another, or demand entrance or admission into the house or inclosure of any citizen of this state, it shall be considered prima facie that his or her intention is to commit a felony, and such demand shall be deemed an assault with intent to commit a felony, and the person or persons so offending, shall, upon conviction, be punished by imprisonment in the penitentiary not less than ten (10) years nor more than twenty (20) years.

avoid the difficulty of measuring the statute against the "more likely than not" standard of review enunciated in *County Court of Ulster County v. Allen,* 442 U.S. 140 (1979), a difficulty necessary if the Court interpreted the statute as creating a mandatory presumption, one which requires the jury to find the inferred fact upon proof of the underlying fact, unless the defendant has produced rebutting evidence. *Id.,* at 588-589.

Because of the Court of Criminal Appeals' reliance on *State v. Bryant,* 585 S.W.2d 586 (Tenn. 1979), it may be inferred that the court felt compelled to construe Tenn. Code Ann. § 39-1-804 as creating a permissive inference and not a mandatory presumption.

In *Bryant,* after holding that Tenn. Code Ann. § 39-2802 (currently § 39-2-704) created a permissive inference, the Tennessee Supreme Court, relying on *Sandstrom v. Montana,* 442 U.S. 510 (1979), held the instructions were inadequate because they did not make clear that the jury may, but need not, draw the inference suggested by the statute and were, therefore, susceptible to an interpretation that the jury must convict upon a showing of masked entry, absent rebuttal proof that there was no criminal intent. *State v. Bryant, supra,* at 589-590. Accordingly, the case was remanded for a new trial in which proper instructions were to be given. *Id.,* at 590.

In *Sandstrom,* the defendant was charged with "deliberate homicide," defined in the Montana statute as a criminal homicide committed "purposely or knowingly." Sandstrom admitted the homicide at his trial, but insisted that he did not commit the crime "purposely or knowingly." He argued that the jury instruction, "[t]he law presumes that

a person intends the ordinary consequences of his voluntary acts,'' had the effect of shifting the burden of proof to him on the issue of whether the defendant acted ''purposely or knowingly.'' *Id.*, at 512-513.

This Court said that the threshold inquiry in determining the constitutionality of such an instruction was to determine the nature of the presumption it described, which determination required:

> careful attention to the words actually spoken to the jury, see *Id.*, [*Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213 (1979)] at 157-159, n. 16, 99 S.Ct., at 2225, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Id., at 514.

In *Ulster*, the Court distinguished between the two types of evidentiary devices, the permissive inference and the mandatory presumption. The permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the State of the basic fact and places no burden of any kind on the defendant. The mandatory presumption tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 156-157 (1979).

In *Sandstrom*, this Court concluded that a reasonable jury could have interpreted the jury instruction "as a direction to find intent upon proof of the defendant's voluntary action (and their 'ordinary' consequences) unless the

defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent." *Id.*, at 517. That conclusion was based upon the force of the words, "the law presumes," and the failure of the trial judge to instruct that the jury presumption could be rebutted.

In *Sandstrom,* this Court relied upon *In re Winship,* 397 U.S. 358 (1970) for "the appropriate mode of constitutional analysis" to be applied to the presumption presented for review in that case. *Id.*, at 519-520.

In *Winship* this Court held:

> [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the *crime* with which he is charged.

Id., at 364 (emphasis added).

The petitioner submits that the case *sub judice* is distinguishable from *Sandstrom* because the jury instruction in this case is in regard to a sentencing status, not an element of a crime.

The Tennessee habitual criminal statutes do not create an independent crime, but instead define a status, prescribing the circumstances under which enhanced penalty is imposed. *Evans v. State,* 571 S.W.2d 283 (Tenn. 1978); *Pearson v. State,* 521 S.W.2d 225 (Tenn. 1975); *Harrison v. State,* 217 Tenn. 31, 394 S.W.2d 713 (1965); *State v. Duffel,* 665 S.W.2d 402 (Tenn. Crim. App. 1983); *State v. Wright,* 650 S.W.2d 57 (Tenn. Crim. App. 1983); *Meade v. State,* 484 S.W.2d 366 (Tenn. Crim. App. 1972); *Canupp v. State,* 3 Tenn. Crim. App. 249, 460 S.W.2d 382 (1970); *Frazier v. Davis,* 567 F.Supp. 4 (E.D. Tenn. 1982).

The State need not prove beyond a reasonable doubt a fact affecting the severity of punishment. *McMillan v. Pennsylvania,* — U.S. —, 106 S.Ct. 2411, 2416 (1986); *Patterson v. New York,* 432 U.S. 197 (1977).

Tenn. Code Ann § 39-1-804 can be construed to create a lawful mandatory presumption; therefore, the failure of the trial court to give instructions indicating the meaning and nature of the inference created by the statute as permissive was not unconstitutional.

—o—

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

JACKSON, MAY SESSION, 1986

STATE OF TENNESSEE,
Appellee

v.

LAMAR FLETCHER,
a/k/a LAMARR
FLETCHER,
Appellant

C.C.A. NO. 88
SHELBY COUNTY

HONORABLE
JOSEPH McCARTIE,
JUDGE

(Armed Robbery—two counts—Habitual Criminal)

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OPINION FILED: August 13, 1986

REMANDED FOR NEW HABITUAL
CRIMINAL PROCEEDING

Joe D. Duncan
Judge

OPINION

The defendant was convicted on two counts of armed robbery, and as to each offense he was found to be an habitual criminal. He was sentenced to serve two concurrent life sentences.

The defendant says the evidence does not support the convictions for armed robbery or the verdict that he is an habitual criminal. He also says the trial judge erroneously instructed the jury on the issue of identity in the habitual criminal proceeding.

The evidence shows three men forced their way into a home where a woman and her three sons lived. These men held guns on the occupants and took the woman's jewelry, cash, and television set. They also took jewelry from one of the sons.

The woman and one of the sons positively identified the defendant as one of the participants in the robbery. Other evidence circumstantially connected him to the crime.

The defendant did not testify but offered evidence from a man who had participated in the offense and who had pled guilty. He testified the defendant did not participate in the crime.

There was sufficient evidence from which the jury could find guilt beyond a reasonable doubt on the robbery offenses, which is the test we apply when the sufficiency of the evidence is raised on an appeal. T.R.A.P. 13(e).

The evidence in the habitual criminal phase of the trial consisted only of records introduced by the state that showed that a person of the same name as the defendant

had previously been convicted of a sufficient number of crimes to qualify him as an habitual criminal. The state offered no other evidence identifying the defendant as being the same person who was named in the records of the previous convictions.

The state relied upon the provisions of T.C.A. § 39-1-804, which states that the judicial records of prior convictions under the same name as the person on trial shall be "prima facie evidence" that the identity of such person is the same. The trial court instructed the jury on the provisions of this statute, but did not instruct the jury as to how to evaluate the permissive inference created by the statute.

The defendant argues that T.C.A. § 39-1-804 is unconstitutional, and that the trial court's instructions unconstitutionally shifted the burden of proof to him. In the alternative, he argues that the trial court failed to give proper instructions on the nature of the "prima facie" provision of the statute. We find merit to this second issue.

In *State v. Woodson,* 705 S.W.2d 677 (Tenn. Cr. App. 1985), our Court, relying on our Supreme Court's decisions in *State v. Bryant,* 585 S.W.2d 586 (Tenn. 1979), and *State v. Merriweather,* 625 S.W.2d 256 (Tenn. 1981), found nothing constitutionally infirm about T.C.A. § 39-1-804, and we held that the statute merely created a permissive inference and did not shift any burden of proof to the defendant.

In *Bryant,* our Supreme Court was concerned with T.C.A. § 39-2-704, which provides in pertinent part:

> If any person or persons, disguised or in mask, by day or by night, shall enter upon the premises of another, . . . it shall be considered prima facie that his or her intention is to commit a felony, ...

In that case, the Court construed the "prima facie" provision of that statute to create merely a "permissive inference," i.e., one that allows, but does not require, the jury to infer the presumed fact from the proved fact. We note that in *Bryant,* the Supreme Court reversed the defendant's conviction because proper instructions were not given to the jury concerning the "permissive inference." Similarly, our Supreme Court ruled in *Merriweather* that the "prima facie" and "presumption of intent" language in T.C.A. § 39-3-302 (bad check statute) was not fatal, pointing out that in *Bush v. State,* 541 S.W.2d 391 (Tenn. 1976), that Court noted that the terms "presumption" and "inference" have frequently been used interchangeably. Also, as in the *Bryant* case, the Court reversed Merriweather's conviction because the jury was not properly instructed.

We note that in *Woodson,* a complaint, like the one in the present case, was made that the trial court had failed to properly instruct the jury on the nature of the permissive inference created by T.C.A. § 39-1-804. However, we found in *Woodson* that this issue had been waived because the defendant had not objected to the charge, had not offered any special requests, and had not listed the complaint in his motion for a new trial.

The posture of the present case is unlike the situation in *Woodson* because in the present case the defendant did object to the charge as given and did list his complaint in his motion for new trial.

Thus, under the principles of *Merriweather* and *Bryant*, we conclude that the failure of the trial court to give proper instructions as to the meaning and nature of the permissive inference established by the statute was error, and a remand is required for a new hearing on the habitual criminal phase of the case. On retrial, the trial court will instruct the jury fully concerning the nature of the permissive inference created by the statute.

This case is remanded for a new trial only on the habitual criminal phase of the trial.

/s/ Joe D. Duncan
Judge

CONCUR:
/s/ Mark A. Walker,
Presiding Judge

(SEE DISSENTING OPINION)
John K. Byers, Judge

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

JACKSON, MAY SESSION, 1986

STATE OF TENNESSEE,

Appellee C.C.A. NO. 88

v. SHELBY COUNTY

LAMAR FLETCHER, a/k/a
LAMARR FLETCHER,

Appellant

DISSENTING OPINION

(Filed August 13, 1986)

I am unable to agree with the majority opinion which holds the instruction by the trial court that judicial records of prior convictions by a person of the same name as the defendant is prima facie evidence of the defendant's prior convictions unconstitutionally shifts the burden of proof to the defendant.

The cases relied upon by the majority all derive from *Mullaney v. Wilber*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and deal with the impermissible shifting of the burden of proof from the state to an accused in prosecutions for criminal offenses. It is settled, without question, that in a criminal prosecution the state is required to prove all the essential elements of the crime, including identity of the accused as the perpetrator thereof, and the state may not be relieved of this burden by any presumption which the defendant must present evidence to refute.

A proceeding to determine if an accused has become an habitual criminal is not a prosecution of a criminal offense. It is a proceeding to determine whether the defendant has a criminal record sufficient to require enhanced punishment, and I am of the opinion the full panoply of constitutional rights does not attach in such a proceeding. Our courts have held consistently that the habitual criminal statute did not create an independent crime, but serves to enhance the punishment for a person who has become an habitual criminal, *Evans v. State*, 571 S.W.2d 283 (Tenn. 1978), and provides enhanced punishment for a person who has become a public menace as defined in the Act, *State v. Wright*, 650 S.W.2d 57

(Tenn. Cr. App. 1983), and defines a status prescribing circumstances under which there is an enhanced penalty for the triggering offense. *State v. Duffel*, 665 S.W.2d 402 (Tenn. Cr. App. 1983).

I am satisfied that the constitutional rights which attach to an accused in this procedure include the right to have notice of the intent to enhance the punishment and the basis for it, the right to appear in person and by counsel, the right to confront witnesses who testify, and the right to offer evidence on his own behalf. *See Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954).

I am unable to find any state or federal constitutional right to trial by jury on the habitual criminal phase of the trial. Our highest courts have held that the guarantees of trial by jury do not encompass the sentencing function. See *Hunter v. State*, 496 S.W.2d 900 (Tenn. 1972), and *Spaziano v. Florida*, 104 S.Ct. 3154 (1984). Except for the language in T.C.A. § 39-1-805 which provides the trial judge shall "inquire of the jury as to whether they find the defendant guilty both of the felony charge and also as an habitual criminal [and shall] record the verdict of the jury and enter judgment accordingly," I find no statutory requirement for a jury in the habitual criminal phase of the proceeding, and I suggest this is more from custom rather than legislative intent.

The right to trial by jury on the habitual criminal charge, as far as I can determine, was obliquely noticed in the case of *McCummings v. State*, 175 Tenn. 309, 134 S.W. 2d 151 (1939), where the Court observed, "Under section

6 of the Act the question as to whether the defendant is a habitual criminal is one for the jury to decide." This section of the Public Act that initiated the habitual criminal prosecutions in this state contemplated a unified trial of the triggering offense and of the habitual criminal phase.

The provisions existed prior to the decision of our Supreme Court in *Harrison v. State*, 394 S.W.2d 713 (Tenn. 1965), which put an end to a unitary trial on the triggering offense and the charge of being a habitual criminal. The Court there established the bifurcated procedure wherein a verdict of guilt on the triggering offense, in a proceeding wherein the evidence of previous crimes were not permitted into evidence, is required before proceeding to the habitual criminal charge is allowed. Thus, the inquiry of the jury as required by T.C.A. § 39-1-805 has no independent meaning and in my view gives no statutory support to the right to trial by jury in that phase of the proceeding.

Jury sentencing in these cases is more probably retained out of custom. *See* T.C.A. § 40-35-203(d). But the fact that we customarily use a jury and proceed on the enhancement by indictment does not make the habitual criminal hearing the equivalent of a trial for all purposes.

Furthermore, the Supreme Court has recently pointed out there is no constitutionally prescribed burden of proof in a sentencing proceeding. In *McMillan v. Pennsylvania*, 39 Cr.L. 3161 (U.S. 1986), the Court declined to apply the *Mullaney* analysis to fact-finding in a sentencing context

and reiterated that it is "within the power of the State to regulate . . . the burden of producing evidence and the burden of persuasion." *Id.* at 3163.

The case involved a mandatory minimum sentence to be imposed by the trial court after a post-trial finding that the defendant possessed a weapon when he committed the crime. The crucial distinction between *Mullaney* and *McMillan* was that possession of a weapon was not, and had not historically been, an element of the underlying felony. Where the state had met its burden of proof on the elements of the crime and the jury had convicted the defendant, the sentencing court was free to proceed on the enhancement. In the case before us, no one suggests that Fletcher's criminal record was an element of the triggering offense.

In *McMillan* the Court also noted with approval that the preponderance standard set out in the federal "dangerous special offender" statute has been uniformly upheld. *Id.* at 3165. That statute, like our own, may result in a prison term in excess of that available on the triggering offense, and it also makes a copy of the former judgment of conviction "prima facie evidence of such former judgment." 18 U.S.C. § 3575.

For these reasons and within the limits of fundamental due process set out in *Specht, supra,* the state is free to allocate some burden of persuasion to the defendant in a sentencing procedure. If the statute as written or the instruction given in this case has the effect of requiring some refutation from the defendant, I do not think this effect is forbidden by the *Mullaney* line of cases, and when we

apply those decisions to sentencing, we are transposing a constitutional rule onto a matter that is not of constitutional proportion.

Although our Sentencing Reform Act requires a finding the accused is the person who committed previous offenses beyond a reasonable doubt in another enhancement context, T.C.A. §§ 40-35-106(c), such rule does not affect the method of proof on such issue but only defines the quantum thereof.

I would hold the instruction is not erroneous and affirm the judgment in this case.

/s/ John K. Byers
Judge

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,

APPELLANT

VS.

SHELBY
CRIMINAL

C.C.A. NO. 88

LAMAR FLETCHER, a/k/a
LAMARR FLETCHER,

APPELLEE

ORDER

(Filed September 29, 1986)

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of the State of Tennessee is denied at cost of appellant.

PER CURIAM

EDITOR'S NOTE:

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NO. 86-5853

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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86-958

LAMAR FLETCHER, PRO SE,

PETITIONER,

RECEIVED
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SUPREME COURT, U.S.

VS.

STATE OF TENNESSEE,

RESPONDENT,

SUPPLEMENTAL BRIEF IN OPPOSITION TO STATE OF TENNESSEE's PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD FOR RESPONDENT;

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PETITIONER - PRO SE

Mr. Lamar Fletcher #100663
Station-A-West Unit 2-12/4
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NO. 86-5853

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAMAR FLETCHER, PRO SE,

PETITIONER,

VS.

STATE OF TENNESSEE,

RESPONDENT,

SUPPLEMENTAL BRIEF

Comes now Petitioner, Lamar Fletcher, Pro Se, and moves this Honorable Court pursuant to Rules of the Supreme Court, Rules, 22, and 16.6 in opposition of the State of Tennessee's petition for writ of certiorari pending jurisdictional statement, that absent some evidence showing the identity of petitioner on trial in connection with being a habitual criminal is too tenuous to permit a reasonable inference of guilt ___ "the inference of the one from proof of the other is arbitrary", Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 1245, 87 L. Ed. 1519.

In the instant, the Legislature record falls even shorter of furnishing an adequate foundation for the "knowledge" presumption, leading how many other Trial Judges to make improper Jury instructions. Hughes v. Mathews, 576 F. 2d 1250 (1978).

> Criminal Law Key 307.... A conclusive presumption which relieves State of duty, to prove all elements of crime beyond reasonable doubt is unconstitutional.
>
> Criminal Law Key. 561(1).... While state has power, within constitutional limits, to define its crime as it wishes, once it has stated what combination of factors constitutes a crime it must prove each of them beyond reasonable doubt.

Giving of instructions as to rebuttable presumption under Tennessee law that evidence presented to juriors is mandatory language that under the same name shall be prima facie evidence that accused is habitual criminal coupled with exclusion of all or any physical evidence offered to show accuracy of identity to form enhancing and mitigating circumstances of being in habitual criminal status unconstitutionally relieved prosecution of proving element of specific identity necessary for habitual criminal conviction beyond reasonable doubt, T.C.A. § 39-1-804, and is impermissible, because of accused right of self-incrimination. Const. Amends. 5, 14. A conclusive presumption which relieves the state of its duty to prove all elements of the crime beyond a reasonable doubt is, therefore, unconstitutional. See, Morrissette v. United States, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L. Ed. 288 (1952).

Petitioner took the stand and swore in under the Fifth Amendment (T. 68-69), So therefore the rebuttal was put in blockage because he did not want his record introduced in the original trial.

Once an accused is convicted this is a proved fact by law and the evidence introduced outlining prior convictions is a presumed fact by juriors and cannot flow from the proved fact, by using names similar in

Nature without displaying evidence to establish the identity is the same, because there is no connection from the proved fact and the presumed one and juriors have little or no understanding of the law until they are charged with the law by the presiding Judge.

In Petitioners case the Judge charged the language T.C.A. § 39-1-804 instructing a directed verdict creating a "mandatory presumption", inwhich was "irrational" and "arbitrary", and hence unconstitutional. The respondents violated their own state statute inwhich states that the names shall be the same [1] T.C.A. § 39-1-804, and if not then we fall short of prima facie evidence. The State never pronounced (2) two names throughout the habitual criminal phase, arbitrarly withholding evidence which would tend to exonerate petitioner, and by this invalidity implied petitioner was a habitual criminal, also using erroneous language from an unconstitutional statute causing the juriors to presume guilt ordering a directed verdict from the trial Judges's erroneous instructions.

Petitioner petitions this Court because their is an absence of available state corrective process throughout the prior circumstances rendering such process ineffective to protect his rights. The Tennessee Court of Criminal Appeals has shown willingness to overturn the lower Court's Judgment where the statutory language authorized judicial action, but the unconstitutional affects of the statutory language has remained unchanged. Tennessee State Courts may not effectuate that intent until the right verbal

---

1./ Tenn. Code Ann. § 39-1-804:

> In all cases where a person is charged under the provisions of this chapter with being an habitual, criminal, the record, or records, of prior convictions of such person upon charges constituting felonies, shall be admissible in evidence, but only as proof that such person is, in fact, an habitual criminal, as defined in § 39-1=801, and a judgment of conviction of any person in this state, or any other state, country or territory, UNDER THE SAME NAME as that by which such person is charged with the commission, or attempt at commission, of a felony under the terms of this chapter, shall be prima facie evidence that the identity of such person is the same.

formula appears in the statute book.

The showing of actual prejudice resulting from the constitutional violation is, Petitioner plead not guilty to all charges and counts, and proceeded to trial, out of the presence of the Jury the petitioner took the stand and swore in under his Fifth Amendment guaranteed constitutional right protecting a disclosure of his past record, because he was on parole at the time, and the stopping of the prosecution's announcement of the silence of petitioner throughout the presentation of the State's case. Wainwright v. Sykes, 97 S.Ct. 2497 (1977) the right not to incriminate oneself. The burden is on the state to secure (a) prima facie determination of identity in prior convictions, not upon the defendant to demand it, but no such instructions were given to that effect.

The prosecution announced the silence of the petitioner through his alleged co-defendant in the original trial, and upon introductory of the initiation of the second charge of the indictment, the habitual criminal phase of the trial, introduced records of a similar name of petitioner violati[illegible] State Statute T.C.A. § 39-1-804 binding petitioner from a rebuttal purpose for self-incrimination, a defense petitioner was guaranteed by the State and Federal Constitution.

The Tennessee habitual, criminal statute T.C.A. § 39-1-804 offends the principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental through the Due Process Clause. Patterson v. New York, 97 S.Ct. 2319 (1977) Supra, Speiser v. Randall, 357 U.S. 513, 523, 78 S.Ct. 1332, 1341, 2 L. Ed. 2d 1460 (1958); Leland v. Oregon, 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, 96 L. Ed. 1302 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L. Ed. 674 (1934). Such shifting of the burden of persuasion with respect to a

fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause. The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma.

Even if such a person was an habitual criminal as in Specht v. Patterson, 87 S.Ct. 1209 (1967) a written report could have been supplied to determine if such a person has a mental deficient, defining habitual "of the nature of a habit". So if someone has picked up a habit, something has gone wrong mentally. The psycho-analysis effects in petitioners case are not patterned, murders, thefts, and concluding in robbery. Petitioner has never been examined by a psychiatrist.

We must recognize that all of the information relied upon by the Jury to guide them in the intelligent imposition of guilt would be unavailable if information were restricted to that given in open Court by witnesses with no prior knowledge (T.105) (T. 106) subject to cross-examination. This proceeding should draw on information concerning every aspect of petitioner's life, subject to the empirical relationship between proved and presumed facts turns, as in the present case, on a variety of circumstances and on the largely unpredictable combinations in which they occur, the "as applied" approach resembles more a holding as to the sufficiency of the evidence than the "more likely than not" determination required by Leary, 2/ because regardless of rebuttable presumptions, the evil of the presumption that this Court has struck down has not that they could not be dispelled, but rather that they forced petitioner to meet inferences that could not rationally be drawn from the facts proved.

2./ 395 U.S. 6, 32-34, 44-45, 89 S.Ct. 1532, 23 L. Ed. 2d 57 (1969).

The petitioner is therefore entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial. The termination trial reflects to hearings such as parole, and the evidence relied on has a responsibility of being accurate or offends the preponderance of evidence standard.

The Tennessee Department of Corrections is overcrowded with Inmates such as petitioner , who were illegally and unconstitutionally indicted, convicted and sentenced under this illegal law making process. 3/ The habitual criminal Act is void because it was held void on its face as in the Application of Boyd, 189 F. Supp. 113 (1959). Rhea v. Edwards, D.C., 136 F. Supp. 671 In the Boyd case, the Court held that the Tennessee habitual criminal act in its original form as enacted in 1939 was unconstitutional. In 1950 the act was amended and re-enacted by the Legislature in the 1950 Code Supplement. This statute has had several violative Due Process Sections, but over the years has been amended and repealed, inwhich is also in violation of State and Federal Constitutional Laws.

Legislature History

3./ The habitual criminal statute in Chapter 22 of the Public Acts of 1939 was passed February 14, 1939 by Hlan R. Maxwell, Speaker of the Senate and John ED O'Dell, Speaker of the House of Representatives then (7) seven days later February 21, 1939 Approved by Prentice Cooper, Governor of the State of Tennessee causing

continued on next page

Petitioner argues that the State presented one Jacket throughout his trial and the habitual criminal was stamped on its face. In bifurcated trials "trial of issues separetly" e.g. guilt and punishment, there would have to be (2) two slots on the face of the Jacket for the verdict. Petitioner has complained to the Board of Professional Responsibility after subsequential conviction and Trial counsel responded it was a "Dummy Jacket". In reference to the record the FOREMAN responded, your Honor, I wrote the verdict up there, I think in the wrong spot, and I put it down and I think it's in the proper position on the Jacket. (T. 92)

In Respondents Petition on page (4) they state that in the habitual criminal phase of the trial showing a "continuous" trial, they introduced records that showed a person by the same name of petitioner had previously been convicted. Prior convictions indictment No. 37982, 37984, 38885, 39623, 41825, 47124, 47125, and 47126 is transcribed to be Lamar Fletcher, but the original indictment shows (2) two names Lamar Fletcher, also known as, Lamarr Fletcher and their was never an explanation put before the juriors or even a calling of (2) two names throughout the bifurcated trial, and by the records reflecting (2) two similar names inwhich no evidence was ever put before the Jury to establish the accuracy in identity. Identity is an "element" of the status and merely a displaying of a record is not a rational connection between the proved fact and the presumed one. The prosecution say that 39. 804 of the Tennessee Code say the records of the Clerk's Office is Prima facie evidence of identity and that's all we really have

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continued from previous page

It to be void on its face being that no State Statute, Municipal Ordinance, Custom or Policy can be approved by the Tennessee Government into legal effect until after enactment by the Legislature and then put before the Election Commissioner for the people's approval in affirmative by a one man - one vote decision as in Cummings v. Beeler, 223 S.W. 2d 913. The respondents have violated Tennessee constitution Article 11, Section 3 omission of the people's vote, Tennessee constitution Article 1, Section 1 and Section 1 of the Declaration of Rights, the power resides in the people to "alter, reform or abolish" the Tennessee Constitution not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all State authority.

to put on. (T. 106)

Petitioner asserts with no prior knowledge as to accuracy of identity this statute creates an unlawful mandatory presumption and is unconstitutional. The trial judge erroneously instructed the defense counsel that he can object to the charge, but that's what the law says. (T. 107) Petitioner's claim was timely because it was objected to at the conclusion of the proof-in-chief of the State's case and also asserted in his motion for new trial and now before this Honorable Court.

In Tennessee the Sixth Amendment and Section 6 of the Act guarantees the right to trial by Jury to determine the status of accused in the habitual criminal phase of the proceedings. In this instant the reasonable - doubt standard should apply because the Jury is the Judge to determine the law, because identity is an element of the charge, offense or status one falls under, causing the State of Tennessee to go beyond the constitutional limits in securing convictions.

The Legislature has construed a statute declaring an individual guilty or presumptively guilty of a crime, or seperate offense, using names identical or similar of accuses' inwhich is unconstitutional. McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86 (36 S.Ct. 498, 500, 60 L. Ed. 899) (1916). The Legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt". Tot v. United States, 319 U.S. 463, 469 (63 S.Ct. 1241, 1246, 87 L. Ed. 1519) (1943). Patterson, 432 U.S., at 210, 97 S.Ct., at 2327. This statute was declared unconstitutional in 1959 on its face.

Tennessee Criminal Court of Appeals directs that on remand, the trial Court, after charging the Jury in accord with T.C.A. § 39-1-804, must instruct the Jury on the permissive inference as follows. 4/ This instruction language will result in a permissive presumption still, because without some due process standards "preponderance of evidence" the Jury will presume by the prosecution's presentment that once guilty always guilty. The petitioner would be subjected to another Fifth Amendment violation after being convicted under a statute constructed with mandatory language causing a directed verdict, because once die is cast to go back would subject petitioner to a second prosecution violative of the "double Jeopardy" clause. Const. Amends. 5, 14.

CONCLUSION

In Petitioner's case the conclusion is opposite McMillan v. Pennsylvania, 106 S.Ct. 2411 (1986), enactment of the habitual criminal statute in Tennessee altered the Maximum sentence and created a seperate penalty that was for the Jury's determination. To hold the juriors from a fair and efficient adjudication to these proceedings would be to deprive petitioner of the Constitutional provisions of Due Process, guaranteed by State and Federal Law. These proceedings were to determine the background or character of petitioner's criteria for such a status. Under the provisions of the Due Proceds Clause, the petitioner should have

---

4./ Prima Facie evidence as outlined in the statute means that you, the jury, may, but need not, infer from the evidence that the defendant and the individual named in the prior convictions are the same.

been afforded the consideration by a preponderance of the evidence to establish the identity as to prior convictions just to reasonably infer the accuracy of clear and convincing evidence.

In essence to let this statute stand would be a dishonor to our Constitutional laws authorizing prosecutors in the State of Tennessee to arbitrarly enhance accused punishment to life without being afforded any provisions of due process or at least in petitioner's instance procedural due process. In Shelby County the judiciary system is set up where mostly everyone indicted under the habitual criminal statute goes before one Judge, Joseph P. McCartie and only in his Court Room, titled Major Violators, this invidious discrimatory process cannot award individuals an opportunity at a fair trial. When entering this Court Room it is well established that one is an habitual criminal or affiliated with one. The constitutional limits to the State's power are exceeded by the Habitual Criminal Act.

Petitioner also asserts that his conviction for robbery is purely circumstantial with uncorroborated and inconsistency in testimonies, and request this court upon the Granting of the writ to award a totalty of the circumstance test as his Application for Extraordinary Appeal displayed in the Criminal Court of Appeals of Tennessee. Also upon the Granting of the writ the petitioner is requesting oral argument.

Respectfully Submitted,

Mr. Lamar Fletcher

Mr. Lamar Fletcher #100663

ORIGINAL

LAMAR FLETCHER, PRO SE,

Petitioner,

~~86-5853~~

VS.

STATE OF TENNESSEE,

Respondent,

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SUPREME COURT, U.S.

86-938

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner Lamar Fletcher, Pro Se, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the Criminal Court of Shelby County and the Criminal Court of Appeals. Application for permission to appeal in the Supreme Court of Tennessee was denied per curiam. Petitioner's affidavit in support of this motion is attached hereto.

/s/ Mr Lamar Fletcher
Mr. Lamar Fletcher #100663

AFFIDAVIT

I, Lamar Fletcher, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay Fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceedings in this Court are true:

1. Are you presently employed?
   a. NO.... March 26, 1985 is the date of my last employment at Huey's automotive 666 Breedlove, Memphis, TN., and salary per-week was $200 + commission.
2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payment, interest, dividends or other sources?
   a. NO.
3. Do you own any cash or checking or savings account?
   a. NO.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?
   a. NO.
5. List the persons who are dependent upon you for support and state your relationship to those persons.
   a. My daughter, Carol Ann Fletcher, inwhich is and will reside in Chicago, Ill., with my parents until my situation changes.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

/s/ Mr. Lamar Fletcher
Mr. Lamar Fletcher #100563

Subscribed and sworn to before
me this 10 day of November, 1986.

Notary: Glenda Sue Stead

My Commission Expires: September 23, 1990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAMAR FLETCHER, PRO SE,

PETITIONER,

VS.

STATE OF TENNESSEE,

RESPONDENT,

PROOF OF SERVICE

STATE OF TENNESSEE)
) SS.
COUNTY OF DAVIDSON)

LAMAR FLETCHER, after being duly sworn, deposes and says that pursuant to Rule 28.2 of this Court he served the within SUPPLEMENTAL BRIEF IN OPPOSITION TO STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI TO THE OFFICE OF THE CLERK, SUPREME COURT OF THE UNITED STATES, at WASHINGTON, D.C. 20543 and on counsel of record for respondents by enclosing a copy thereof in an envelpoe, mailed to:

Mr. Jerry L. Smith
Deputy Attorney General
450 James Robertson Parkway
Nashville, TN. 37219-5025
(615) 741-2216

and depositing same in the United States mails at Nashville, Tennessee on 15th December, 1986.

Mr. Lamar Fletcher

Mr. Lamar Fletcher #100663

Subscribed and sworn to before me this 12 day of December, 1986.

Notary: [signature] My Commission Expires; My Commission Expires Oct. 24, 1988